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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE GREGORIO GONZALEZ,

Defendant and Appellant.

B299447

(Los Angeles County  
Super. Ct. No. TA138820)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Reversed and remanded with directions.

Julie Caleca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Zee Rodriguez and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jorge Gregorio Gonzalez pleaded nolo contendere to one count of grand theft by embezzlement. On October 18, 2016, he was placed on five years' probation for this offense. On June 1, 2017, the trial court summarily revoked Gonzalez's probation and issued a bench warrant for his arrest, apparently in part based on allegations that Gonzalez failed to report periodically to the probation office and make restitution payments to the victim.

Approximately two years later, Gonzalez was arrested pursuant to the bench warrant. At a July 2, 2019 hearing, the trial court offered to reinstate Gonzalez's probation if he admitted to violating its terms and conditions and agreed to extend probation to June 1, 2024. Gonzalez's trial counsel objected to the offer because it would have subjected Gonzalez to a probationary term in excess of the five-year maximum statutory term, which was to expire on November 19, 2023. The trial court rejected counsel's argument, and Gonzalez accepted the court's offer. Based on Gonzalez's admission, the trial court found that Gonzalez violated probation, and reinstated probation with an expiration date of June 1, 2024.

On appeal, Gonzalez asserts the trial court lacked authority to extend his probation beyond November 19, 2023. We agree. We therefore reverse the trial court's order finding a probation violation and reinstating probation, and remand this matter with instructions to: (a) Conduct a revocation hearing and, (b) if Gonzalez admits the probation violation or the trial court finds that Gonzalez violated the terms and conditions of his probation, decide whether to reinstate probation on the same or different terms and conditions, or terminate probation and impose a sentence.

## FACTUAL AND PROCEDURAL BACKGROUND

We summarize only those facts that are relevant to this appeal.

On June 22, 2016, the People filed an information charging Gonzalez with one count of grand theft by embezzlement, in violation of Penal Code<sup>1</sup> section 487, subdivision (a). On September 9, 2016, Gonzalez pleaded nolo contendere to this offense.

On October 18, 2016, the trial court suspended the imposition of Gonzalez's sentence,<sup>2</sup> and placed him on formal probation for a period of five years on the condition that he serve 365 days in the county jail. At a restitution hearing held on January 10, 2017, the court ordered Gonzalez to pay restitution to the victim in the amount of \$138,868 by October 21, 2017.

On June 1, 2017, the trial court called the matter for a possible violation of Gonzalez's probation. Gonzalez did not appear at the hearing. The court revoked Gonzalez's probation and issued a bench warrant for his arrest.<sup>3</sup>

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

<sup>2</sup> At the October 18, 2016 hearing, the trial court did not clarify whether it was suspending the *imposition* or the *execution* of Gonzalez's sentence. The minute order for the hearing provides in pertinent part: "Imposition of sentence suspended." The record does not indicate there was any pronouncement of sentence.

<sup>3</sup> The minute order for the June 1, 2017 hearing does not explicitly identify the reasons why Gonzalez's probation was revoked or why the court issued the bench warrant. The supplemental probation report discussed *post* claimed that: "Probation was revoked on 06/01/17 due to [Gonzalez] not reporting to probation as instructed, failing to comply with his

At some point on or before June 18, 2019, Gonzalez was arrested pursuant to the bench warrant. On June 18, 2019, Gonzalez appeared in court on the bench warrant, and the trial court ordered the probation officer to prepare a supplemental report. Gonzalez was remanded to custody at the conclusion of the hearing.

On July 2, 2019, the probation office filed a supplemental report. The report asserted that Gonzalez had not reported to the probation office since November 8, 2016, and that he had not made any restitution payments since May 24, 2017. The report recommended that the court find Gonzalez in violation of probation, reinstate his probation, and extend it to November 19, 2023.

On the date on which the supplemental report was filed, the trial court “called [the case] for supplemental report.” The trial court offered to reinstate Gonzalez’s probation and extend it to June 1, 2024 if Gonzalez admitted that he violated probation and waived his right to a probation revocation hearing. The court reasoned that Gonzalez should “agree to extend [his] probation for another four and a half years since [he] really [was]n’t on probation for more than six months.” The court stated that if Gonzalez did not accept its offer, the court would schedule a revocation hearing.

Gonzalez’s trial counsel contended that his client was entitled to nine months of credit because “[h]e was placed on

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financial obligation, and failing to appear in court.” (Some capitalization omitted.)

probation [on] September 8th”<sup>4</sup> and “[t]he maximum period of probation is five years.” The trial court apparently disagreed, and reiterated its offer to extend probation to June 1, 2024; Gonzalez’s trial counsel responded: “He’ll agree to that, Your Honor, but it is not a legal order.” The court replied: “What is not a legal order? He can extend his probation as long as he wants to.” Defense counsel repeated his contention that “[f]ive years total is the maximum” amount of time in which Gonzalez could be on probation.

Ultimately, Gonzalez’s counsel stated that his client would “admit the violation and waive a hearing,” and Gonzalez subsequently admitted that he violated probation and agreed to extend his probation to June 1, 2024. The court then found Gonzalez in violation of probation based on his admission to that effect, reinstated his probation, extended the probationary term to June 1, 2024, and released him from custody. Gonzalez timely appealed this order on July 5, 2019.

## **DISCUSSION**

On appeal, Gonzalez argues that the trial court erred in extending his probation to June 1, 2024, and asks us to reverse that aspect of the trial court’s order and “remand the matter . . . with directions to modify the order to extend probation to a date no later than November 19, 2023.” Conversely, the People contend that the court could extend probation to at least June 1, 2024 because the court had the authority to subject Gonzalez to an entirely new five-year term of probation.

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<sup>4</sup> As noted earlier, Gonzalez pleaded *nolo contendere* on September 9, 2016, but was not actually placed on probation until October 18, 2016.

Although we agree that the trial court erred in extending Gonzalez’s probation to June 1, 2024, we conclude that the proper disposition is to reverse the order finding a probation violation and reinstating probation, and remand the matter to allow the trial court to hold a probation revocation hearing. If Gonzalez admits violating probation or if the trial court finds Gonzalez violated probation, the trial court may either reinstate probation containing the original or new terms and conditions, or impose a sentence.

**A. Section 1203.1, Subdivision (a) Precludes Extending Gonzalez’s Probation Beyond November 19, 2023**

Section 1203.1, subdivision (a) provides in pertinent part: “[W]here the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years.” There is no dispute that Gonzalez’s probationary term was subject to section 1203.1, subdivision (a)’s 5-year limitation.<sup>5</sup>

Gonzalez concedes that, notwithstanding this five-year statutory restriction, section 1203.2, subdivision (a)’s “tolling provision” authorized the trial court to extend his probation beyond its initial expiration date of October 17, 2021.

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<sup>5</sup> (See *People v. Kaufman* (2017) 17 Cal.App.5th 370, 394–396 “[Grand theft] may be punished by either ‘imprisonment in a county jail not exceeding one year or [as a felony] pursuant to subdivision (h) of Section 1170.’ (§ 489, subd. (c).) Section 1170 provides that ‘a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.’” (§ 1170, subd. (h)(1).)”).

Section 1203.2, subdivision (a) provides in relevant part: “The revocation [of probation], summary or otherwise, shall serve to toll the running of the period of supervision.” (See § 1203.2, subd. (a).) This provision allows a trial court to “recalculate the date of expiration of [the defendant’s] probationary term as a result of the tolling.” (See *People v. Jackson* (2005) 134 Cal.App.4th 929, 932 (*Jackson*).)

Here, the trial court initially granted Gonzalez probation on October 18, 2016, and revoked it on June 1, 2017. Because Gonzalez was on probation for 7 months 13 days before his probation was summarily revoked, section 1203.2, subdivision (a) authorized the trial court to place Gonzalez on probation for another 4 years 4 months 17 days beginning on July 2, 2019—i.e., until November 19, 2023.

**B. Section 1203.2, Subdivision (e) Did Not Authorize a New Five-Year Probationary Term**

The People argue that section 1203.2, subdivision (e) empowered the trial court to “reinstat[e] [Gonzalez’s] five-year probationary term” with a July 1, 2024 expiration date (i.e., one month after the expiration date chosen by the trial court). The People correctly acknowledge that section 1203.2, subdivision (e) is the only statutory authority for reinstating probation beyond the five-year statutory maximum term.<sup>6</sup>

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<sup>6</sup> The People admit that Gonzalez’s consent to extending his probation to June 1, 2024 did not authorize the trial court to do so. (See *Jackson, supra*, 134 Cal.App.4th at p. 932 [“Appellant’s request for the extension did not empower the trial court to impose a probationary term exceeding the maximum statutory duration.”].)

(See *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1267).

Section 1203.2, subdivision (e) provides in pertinent part: “If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction.”

The plain text of section 1203.2, subdivision (e) conditions the trial court’s authority to “again place the person on probation” for a new probationary period on the court’s issuance of an order setting aside “the judgment, the revocation of probation, or both . . . *after the expiration of the probationary period . . .*” (See § 1203.2, subd. (e), italics added; see also *People v. Sanchez* (2019) 38 Cal.App.5th 907, 916 [“Where . . . the plain text is unambiguous, it is controlling.”])

Division Eight of our court endorsed this interpretation of section 1203.2, subdivision (e) in *Jackson*. (See *Jackson, supra*, 134 Cal.App.4th at pp. 931–932). The People characterize *Jackson*’s interpretation of this provision as “dicta” that was “abrogated” by our Supreme Court in *People v. Leiva* (2013) 56 Cal.4th 498 (*Leiva*). We disagree.

The People do not explain their conclusion that *Jackson*’s construction of section 1203.2, subdivision (e) is mere dicta. It is true that, ultimately, Division Eight concluded the defendant there could not contest the trial court’s order extending probation beyond the maximum statutory period because she did not timely appeal and she was estopped from raising that challenge by inviting the trial court’s error. (See *Jackson, supra*, 134 Cal.App.4th at pp. 932–933.)



Even if dicta, we would still find *Jackson*'s plain reading of section 1203.2, subdivision (e) persuasive. (See *People v. Valencia* (2011) 201 Cal.App.4th 922, 929 ["Although not binding, we may nevertheless consider the reasoning of [dicta from prior] decisions to determine whether they have any persuasive effect under the facts presented here."].) The First District joins in our interpretation of this provision. (*People v. Ottovich* (1974) 41 Cal.App.3d 532, 535 ["Here, appellant's probationary period had not expired at the time of the court's order setting aside the order of revocation of probation. Therefore, section 1203.2 is inapplicable to the case at bar."].)

As noted above, the People argue *Leiva* abrogated *Jackson*'s interpretation of section 1203.2, subdivision (e). Not so.

In *Leiva*, the trial court placed defendant on probation for three years, and, during that term, the court summarily revoked defendant's probation for failure to report to the probation department. (See *Leiva, supra*, 56 Cal.4th at p. 502.) It was later revealed that the defendant failed to report because he had been deported to El Salvador after being released from jail. (See *ibid.*) During a subsequent probation revocation hearing, the trial court found that the defendant had violated probation by failing to report to probation upon his return to the United States, even though the defendant's reentry into the country occurred *after* his initial three-year probationary term had expired. (See *id.* at pp. 502–503.) The trial court reinstated probation and extended it such that the probationary term expired approximately 16 months after the revocation hearing. (See *ibid.*)

The defendant was subsequently deported again, and the trial court summarily revoked the defendant's probation based on

his failure to report to the probation department. (See *Leiva, supra*, 56 Cal.4th at pp. 503–504.) The defendant later illegally reentered the United States. (See *ibid.*) At a subsequent formal revocation hearing, the trial court found the defendant violated probation by reentering the country illegally, and sentenced the defendant to prison on his underlying conviction. (See *ibid.*) The defendant appealed the trial court’s order reinstating and extending his probation and the order imposing the prison sentence. (See *ibid.*)

The issue on appeal was “whether, once probation has been summarily revoked, [section 1203.2, subdivision (a)’s] tolling provision permits a trial court to find a violation and then reinstate or terminate probation based solely on conduct that occurred *after* the court-imposed period of probation had elapsed.” (See *Leiva, supra*, 56 Cal.4th at p. 502.) Our Supreme Court held that this “tolling provision preserves the trial court’s authority to adjudicate, in a subsequent formal probation violation hearing, whether the probationer violated probation during, but not after, the court-imposed probationary period.” (*Ibid.*)

In a footnote, the *Leiva* court observed that its holding was “fair to the prosecution because, upon proof that a defendant did *violate probation before the expiration of the probationary period*, probation may be reinstated or a new term may be granted.” (*Leiva, supra*, 56 Cal.4th at p. 518, fn. 7, italics added, citing §§ 1203.2, subd. (e) & 1203.3).<sup>7</sup> In making this observation, the high court simply noted that a trial court may grant a new

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<sup>7</sup> Section 1203.3, subdivision (a) provides in pertinent part that “[t]he court has the authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.”

probationary term based on a probation violation that occurred before the probationary period had elapsed. (See *Leiva*, at p. 518, fn. 7.) It did not hold that section 1203.2, subdivision (e) authorizes a trial court to issue such an order prior to the expiration of the probationary term. In fact, *Leiva* had no occasion to reach that question because the orders on appeal were issued *after* the original term of probation had elapsed. (See *Leiva*, at pp. 502–504.)

Even without the benefit of tolling, Gonzalez’s probation had not yet expired when the trial court reinstated probation on July 2, 2019. Accordingly, section 1203.2, subdivision (e) did not authorize the trial court to extend Gonzalez’s probation beyond November 19, 2023.

### **C. The Trial Court and the Parties Should Be Restored to the Status Quo Ante**

“[A]fter the summary revocation [of probation], the defendant is entitled to formal proceedings for probation revocation. The purpose of the formal proceedings is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution to prove the alleged violation occurred and justifies revocation. [Citation.]’ [Citation.]” (See *Leiva*, *supra*, 56 Cal.4th at p. 505.)

Further, “upon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison.” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 (*Bolian*).)

At the July 2, 2019 hearing, the trial court offered to reinstate Gonzalez’s probation if: (a) Gonzalez admitted that he violated probation, thus obviating the need for a contested probation revocation hearing; and (b) he agreed to extend probation to June 1, 2024. As noted in our factual background, the trial court stated its belief—albeit a mistaken one—that it had discretion to extend Gonzalez’s probation beyond five years plus any tolling, such that the probationary term would expire after November 19, 2023.<sup>8</sup> As the trial court said, “What is not a legal order? He can extend his probation as long as he wants to.”

“[W]hen the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion.” (See *Bolian*, *supra*, 231 Cal.App.4th at p. 1421.) That general rule is applicable here.

Had the trial court known that it lacked discretion to augment Gonzalez’s probationary period to June 1, 2024,

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<sup>8</sup> Gonzalez argues that “the trial court did not impose a new probationary term under section 1203.2, subdivision (e), nor did it intend to.” He insists “[i]t is clear the trial court’s intention was to extend the probationary term up to the maximum term of five years, giving [Gonzalez] credit for the time he already served on probation.” Gonzalez further contends “the trial court incorrectly calculated the term it intended to give” because it indicated its intent to extend probation for four and a half years, even though such an extension “would give [Gonzalez] a termination date of January 1, 2024, not June 1, 2024 as indicated by the court.” Assuming *arguendo* that Gonzalez’s interpretation of the trial court’s statements were correct, we would still conclude that its ruling was predicated on the mistaken belief that the court was authorized to extend Gonzalez’s probationary term beyond November 19, 2023.

we cannot exclude the possibility that the trial court would not have offered to reinstate probation at all in exchange for Gonzalez's concession that he violated probation. The trial court could have imposed sentence, or it could have reinstated probation on different terms and conditions, including serving some custody time. (See *Jackson, supra*, 134 Cal.App.4th at p. 936 ["Had the court realized . . . that it could not legally extend appellant's probation, it may have chosen to either reinstate her probation for the short balance of its term or to terminate her probation and impose a sentence"]; *Bolian, supra*, 231 Cal.App.4th at p. 1422 ["Upon finding a probation violation, [a trial] court ha[s] the broad discretion to choose between reinstatement and termination."].)

The question remains whether on remand, Gonzalez will be held to his previous admission of violating probation. Based on the limited record before us, we cannot exclude the possibility that Gonzalez could prevail at a contested probation revocation hearing. Accordingly, on remand, the fairer disposition would be to relieve Gonzalez from his prior admission and allow him to contest the violation if he so chooses.

Thus, to restore the trial court and the parties to the positions they occupied before the court erred, we reverse the trial court's order finding of a probation violation and reinstating probation, and direct the trial court to conduct a probation revocation hearing. (See § 1260 ["The court may reverse, affirm, or modify a judgment or order appealed from, . . . and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; cf. *Jackson, supra*, 134 Cal.App.4th at p. 936 [deeming it appropriate to "restore the [trial] court to the position it occupied

before” it committed the error in question].) At such a hearing, Gonzalez may, of course, contest whether he violated probation or admit the violation. If the trial court finds Gonzalez violated the terms and conditions of his probation, then the trial court may exercise its discretion to reinstate probation and if so, it may elect to modify the terms and conditions thereof, or the trial court may instead terminate probation and impose a sentence.

### **DISPOSITION**

The judgment finding Gonzalez violated his probation and reinstating his probation is reversed, and the matter is remanded to the trial court. We direct the trial court to hold a probation revocation hearing and, if Gonzalez admits violating probation or the court finds that Gonzalez violated the terms of his probation, then the court may exercise its discretion to reinstate probation, and if so, modify the terms and conditions thereof, or terminate probation and impose sentence.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.